IN THE SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD CO.,
*Appellants,*

VERSUS

THE CITY OF NEW YORK, ALEXANDER E. ORR AND MEMBERS OF THE BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK AND OTHERS,
*Respondents.*

No. 489.
October, 1902.

The defendants-respondents respectfully object to the submission of this appeal to the Court without oral argument. They submit that the order made by the Court on 8th December, 1902, does not permit such a submission without their assent. That order was as follows:

> "On consideration of the motion to advance this case for oral argument,
>
> "It is Now Here Ordered by the Court that said motion be and the same is hereby, denied, but leave is hereby granted to submit the cause on the question of jurisdiction as under the 32d rule, if counsel shall be so advised."

The respondents respectfully insist that, under this order the cause may not be submitted without argument, unless their counsel shall be so advised and shall assent,—and that, as their coun-

sel do not assent, and are not so advised, the cause should stand for argument in regular order, and that the present application of the complainants-appellants should be denied.

The question of the jurisdiction of the court below, involves the entire merit of the controversy. The complainants and defendants were all citizens of the State of New York. The complainants sought by their bill to invoke the protection of the federal constitution, upon the claim that the rapid transit act of the State of New York, impaired the obligation of a contract claimed to exist between the complainants and the City of New York. The Circuit Court held that it did not appear that the complainants had a legal contract subject to impairment or that there was any ground to believe that such a legal contract had been impaired.

The contention of the defendants was that it did not appear upon the face of the complainant's bill that there was any such contract or that there had been any effort to impair the obligation of any such contract. The Circuit Court held with the defendants, and dismissed the bill because, in the absence of allegations tending to establish such a contract or such impairment of contract, that court was without jurisdiction.

This case is one of unusual importance, for it not only involves the validity of the scheme for the construction of the Rapid Transit Rail-

way in the City of New York,—a vast work now approaching completion,—but it also involves the constitutionality of the law under which this municipal railway and all future extensions must be built.

This Court will perceive that the question of jurisdiction which has been certified, cannot be presented except as the entire merits of the controversy are presented. In such case it is submitted that the defendants ought not to be asked, and cannot be required, to forego the advantage of an oral presentation of their cause. They are advised that they have a right to such a presentation and upon that right they respectfully insist.

If the Court, however, should differ from this view of the defendants, the latter respectfully ask for such time as may be proper to submit their argument upon the questions presented to the Court.

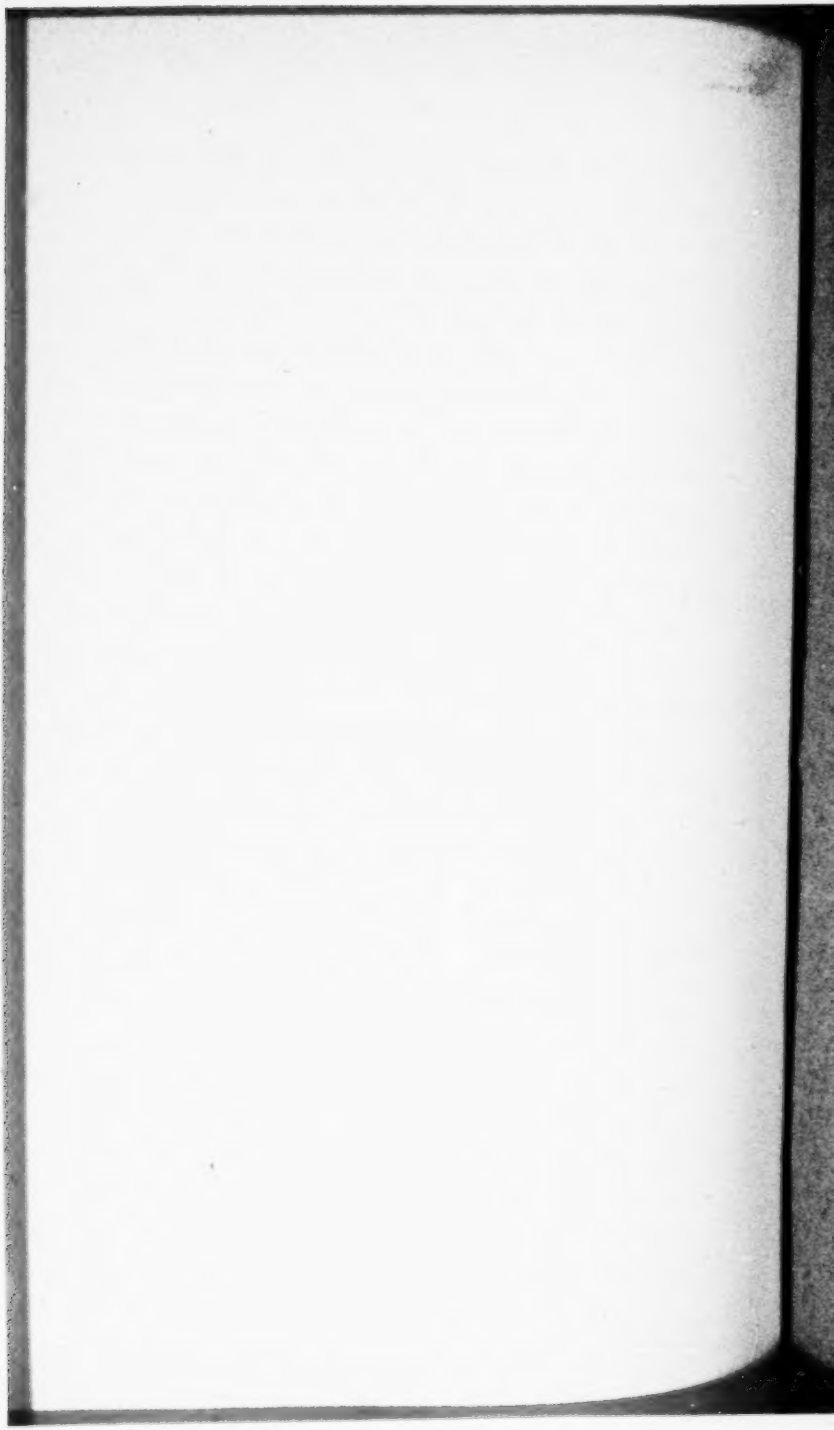
DATED APRIL 20TH, 1903.

G. L. RIVES,
*Corporation Counsel.*

GEO. W. WICKERSHAM,
DE LANCEY NICOLL,
EDWARD M. SHEPARD,
*Of Counsel for Respondents.*

# DEFENDANT'S

# BRIEF



FILE COPY

150

No. 13503

FILED

JAN 8 1904

JAMES H. McKENNEY,
Clerk

# SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY, *Complainants, Appellants,*

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, INDIVIDUALLY AND AS MAYOR OF THE CITY OF NEW YORK, BIRD S. COLER, INDIVIDUALLY AND AS COMPTROLLER OF THE CITY OF NEW YORK, ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH AND MORRIS K. JESUP, INDIVIDUALLY AND AS MEMBERS OF THE PRETENDED BOARD OF RAPID TRANSIT COMMISSIONERS OF THE CITY OF NEW YORK, JOHN B. McDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY, *Defendants, Respondents.*

# BRIEF FOR DEFENDANTS, RESPONDENTS, THE CITY OF NEW YORK AND OTHERS.

GEORGE L. RIVES,
*Corporation Counsel,*
Solicitor for Defendants, Respondents, The City of New York, Robert A. Van Wyck, individually and as Mayor of The City of New York, Bird S. Coler, individually and as Comptroller of The City of New York.

THEODORE CONNOLY,
*Of Counsel.*

(7312) MARTIN B. BROWN CO., Printers and Stereotypers, 49 to 55 Park Place, New York.

# Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, and the RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants-Appellants,

*against*

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH and MORRIS K. JESUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York, JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants-Respondents.

**Brief for Defendants-Respondents, The City of New York, Robert A. Van Wyck, individually and as Mayor of the City of**

**New York, and Bird S. Coler, individually and as Comptroller of the City of New York.**

## STATEMENT.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing an amended bill in equity for want of jurisdiction.

The bill as amended prayed an injunction against the construction and operation of an underground railroad and subway on Manhattan Island, in the City of New York, upon a route to which the complainants claimed to have a prior exclusive right, and also against the payment by the defendants, who are municipal officers, of any money under chapter 4 of the Laws of 1891 of the State of New York, the Rapid Transit Act, to the defendants, John B. McDonald and the Subway Construction Company, or to any one, and against the issuing of bonds or stock of the City of New York under the Rapid Transit Act, or to obtain money to aid in the construction of such underground railroad; and for a receiver to take possession of so much of the underground railroad as is already constructed. The bill also contains the prayer for general relief under which it is stated by complainants in their brief a decree might be granted, compelling the payment of the value of the complainants' franchises, in lieu of an injunction.

The real object of the entire action is disclosed on page 107 of complainants' brief, as follows:

> "It may be, however, that upon the final hearing after proofs have been taken, the Court will not give us all this relief, but will direct that upon the payment of the value of our franchise an injunction be withheld."

In other words, the action is really one to compel defendants to purchase the alleged rights of complainants.

As the co-defendants-respondents in this action, other than the City of New York and its municipal officers, will file a very full brief upon this hearing, it will not be necessary for the present defendants-respondents to do more than generally join in the brief of their co-defendants-respondents and to ask that it may be availed of by these defendants-respondents, and in addition thereto these defendants-respondents desire to briefly set forth in this memorandum-brief a few considerations which, in their opinion, should dispose of the appeal.

For the reasons already stated it will not be necessary to here repeat at length the allegations of the bill of complaint which are well summarized in the opinion of Judge Hazel and which are also given in the brief for the codefendants-respondents already mentioned.

After the filing of the bill, demurrers were interposed by the various respondents-defendants (pp. 44–47, Record), which, among other things, alleged that it appeared upon the face of the bill that the Court was without jurisdiction in the premises in that the matter in dispute did not arise under the Constitution or laws of the United States, and also that no case was stated in the bill as amended authorizing the relief sought or any other relief.

These demurrers were sustained by the District Judge (whose opinion appears at page 52), at the Circuit Court, and the bill of complaint as amended was dismissed for want of jurisdiction upon the ground that the Circuit Court had no jurisdiction of the same (p. 61, Record).

Thereafter a certificate was made (Record, p. 62), by the Circuit Court certifying to this Court the decree entered herein, which is in part, as follows:

> "And this Court further certifies that in said suit the jurisdiction of this Court is in issue; and it further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrers to said amended bill in equity as follows:
>
> "1. When a circuit court of the United States decides that a complainant to a bill of equity brought to enforce an alleged right which he claims arises under the Constitution of the United States shows no right arising under the Constitution of the United States, has said Court jurisdiction to decide and hear and determine other matters of equitable cognizance pleaded in said bill, which did not arise under either the Constitution of the United States or a statute, or a treaty thereof; if the complainant and defendant are citizens of the same state?
>
> "2. Has the Court jurisdiction of the said amended bill in equity?"

The assignment of errors is found at page 65 of the Record, and also at page 14 of the Brief of Complainants-Appellants.

In addition to the matters set forth in the brief of their co-defendants-respondents herein, the defendants-respondents, the City of New York and its officers, respectfully present the following points:

## I.

**A complainant who alleges that the Circuit Court of the United States has jurisdiction of a controversy by reason of the infringement of a right of complainant under the Constitution of the United States, must show that such right is a real one.**

Of the two questions certified to this Court, it is supposed that the more important is the second one, namely, "Has the Court jurisdiction of the said amended bill in equity?"

Such jurisdiction being claimed by reason of the existence of a right of the complainants under the Constitution of the United States, to give jurisdiction upon this Court, complainants must show that they have a real existing right, or at least that they claim such right in good faith.

It was said by this Court, in a well-known case:

> "Before we can be asked to determine whether a statute has impaired the obligation of a contract it should appear that there was a legal contract subject to impairment and some ground to believe that it has been impaired; and that to constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."
>
> New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 88.

It is claimed by complainants-appellants that the rule, as laid down in the case just cited, does not apply to suits brought in the United States Courts, and they

cite in favor of this contention a recent case in the Circuit Court, Southern District of California, Riverside and A. Ry. Co. *vs.* City of Riverside, 118 Fed. Rep., 736, which holds that it is sufficient if the impairment or deprivation of contract rights *is claimed in good faith and not frivolously*, even though it should appear that there is no real and valid contract.

And the District Judge in that case quoted from the opinion of this Court in City Ry. Co. *vs.* Citizens' St. R. Co., 166 U. S., 558, as follows:

> "All that it is necessary to establish the jurisdiction of the Court is to show that the complainant had claimed in good faith to have a contract with the City which the latter had attempted to impair."

This subject of jurisdiction has, of course, been frequently considered by this Court.

It was said in a well-known case, which arose in the Circuit Court, and in which the jurisdiction was invoked on two grounds, that the case arose under the Constitution, and also that there was diverse citizenship:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, *upon the determination of which the result depends, then it is not a suit arising under the Constitution* (Shreveport *vs.* Cole, 129 U. S., 36; Starin *vs.* New York, 115 U. S., 248, 257; Gold Washing and Water Company *vs.* Keyes, 96 U. S., 199).
>
> "The judicial power extends to all cases in law and equity arising under the Constitution, but these are *cases actually and not potentially arising, and jurisdiction cannat be assumed on mere hypothesis.* In this class of cases it is necessary to the

exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare."

New Orleans *vs.* Benjamin, 153 U. S., 411, 424.

In a later case this Court said:

"We cannot accede to the proposition that because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the Circuit Court of the United States. *Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose.* There must be a real substantive question, on which the case may be made to turn.';

St. Joseph & Grand Island R'd *vs.* Steele, 167 U. S., 659, 662.

In a still later case it was said:

"It is * * * quite plain that the complainants base their case upon the allegation that their property is about to be taken from them by the City authorities without due process of law and in violation of the Constitution of the United States, because the Act of 1890 violates the Constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is, the Federal courts are bound in such a case as this by the decision of the State tribunal. There is no construction of the Federal

Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa. How can it be said upon such facts that any question arises under the Constitution or laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other (Starin *vs.* New York, 115 U. S., 248). There is no dispute about construction in any way whatever; the only question is as to the validity of the City organization, which, as stated, is a matter of State law."

McCain *vs.* Des Moines, 174 U. S., 168, 176.

And quite recently this Court again considered the question, saying:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or Laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

Western Union Tel. Co. *vs.* Ann Arbor Rd. Co., 178 U. S., 239, 243.

And in the latest case, of which is one apparently relied upon by complainants-appellants in their brief, it is said:

> "It has been repeatedly held that, on error from a State Court to this Court, where the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed. New Orleans Water Works Co. *vs.* Louisiana, ante, 336, and authorities cited. * * * And *it is true also, as observed in New Orleans Water Works Co.* vs. *Louisiana, supra, that a similar principle is applied in analogous cases originally brought in a Court of the United States.* McCain *vs.* Des Moines, 174 U. S., 168; St. Joseph and Grand Island Railroad *vs.* Steele, 167 U. S., 659. But the doctrine referred to has no application to a case brought in a Federal Court where the very subject matter of the controversy is Federal, however much wanting in merit may be the averments which it is claim establish the violation of the Federal right."
>
> Swafford *vs.* Templeton, 185 U. S., 487, 493.

The five cases just cited arose in the United States Courts.

It is submitted that the allegations of the present bill of complaint cannot stand the test conceded by complainants' brief to be the correct one, even in cases brought in the United States Courts.

The result of the authorities is that even in cases brought in the Federal Courts there is no jurisdiction unless it shall appear that the complainant claims *in good faith* and not frivolously to have a right under the United States Constitution which has been impaired.

Applying to the allegations of the bill of complaint, therefore, the test suggested in the case last cited, whether or not the question asserted to be raised is manifestly lacking of color of merit, and whether a Federal question is *bona fide* raised, we will now proceed to consider the allegations in question.

## II.

### The bill of complaint shows that a Federal question is not involved, because it shows on its face that complainants have no contract right under the Constitution of the United States.

The principal claim of complainants-appellants is based upon rights declared to have been derived from The Central Tunnel Railway Company, a corporation stated to have been incorporated under the General Railroad Law of the State of New York, chapter 140 of the Laws of 1850, and which is alleged to have acquired the right of construction under another statute, chapter 582 of the Laws of 1880 of that State, entitled "An Act to provide for excavating and tunneling and bridging for transportation purposes within the cities and villages of this State."

The last-mentioned act was passed as a supplement to the General Railroad Act, and its privileges can only be availed of by corporations incorporated under the General Railroad Act or under some special act. (Laws of 1880, chapter 582, section 1.)

It being distinctly claimed by complainants that their predecessor was incorporated under the General Railroad Act of 1850 and obtained additional privileges under chapter 582 of the Laws of 1880 (see

Article of Association of the Central Tunnel Railway Company, pages 36–38 of Record), it becomes necessary to ascertain whether they have obtained the right of construction claimed by them under the acts in question.

The first requisite to the obtaining of rights of construction by complainants' predecessor, the Central Railway Tunnel Company, was a compliance with section 18 of Article 3 of the Constitution of the State of New York of 1846, as amended in 1874, which, so far as relevant, is as follows:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on the line, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad being first obtained, or in case the consent of such property-owners cannot be obtained, the General Term of the Supreme Court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination confirmed by the Court may be taken *in lieu of the consent of the* PROPERTY-OWNERS."

It is to be noted that the action of the Supreme Court Commissioners, under this section, merely takes the place of that of the property-owners, leaving the consent of the municipal authorities to be still obtained before the right of construction is perfect.

Section 1 of chapter 582 of the Laws of 1880, under which the Central Tunnel Railway Company claims

its right of construction, is, so far as relevant, as follows:

> "Whenever such road, or any part of the same, is intended to be built within the limits of any city or incorporated village of this State and to run by means of a tunnel underneath any of the streets, roads or public places thereof, the said company, before building the same underneath any of said streets, roads or public places, shall obtain the consent of the owners of one-half in value of the property bounded on the line, and the consent of the board of trustees of the village by resolution adopted at a regular meeting and entered on the records of said board, and of the proper authorities having control of said streets, roads or public places; or in case such consent of the owners of property bounded on the line cannot be obtained, the general term of the supreme court in the district in which such city or village is situated, may upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said street, roads and public places, or any of them * * * and the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent *of said authorities and property-owners.*"

It was held by the Court of Appeals of the State of New York that the act of 1880 just mentioned authorized and regulated underground street railways, and the Court further held that a railway confined within the limits of a city and proposed to be built exclusively under the surface of the ground, was a street railway within the meaning of the State Constitution, article 3, section 18, in regard to consents by the property-owners and municipal authorities.

And the Court of Appeals in the case referred to (Matter of N. Y. District R. R. Co., 107 N. Y., 42), discussed at length the reasons why such an underground road is a street railway and within the terms of the section and article of the Constitution mentioned.

*And the Court squarely held that the provisions of the Act of* 1880, *just cited, which allowed the action of the Supreme Court Commissioners to stand in the place of the consent of the municipal authorities were unconstitutional.*

It is submitted that this ruling is fatal to any rights of construction claimed by complainants as successors of the Central Tunnel Railway Company.

But the Central Tunnel Railway Company did not go so far as to obtain action by the Supreme Court Commissioners. It obtained the appointment of Commissioners and did nothing more.

We have, then, the case of a corporation claiming a right of construction of a railroad under an unconstitutional statute, under which it took no complete action.

An examination, therefore, of the bill of complaint in the action shows that the complainants are not making a claim *in good faith* that a Federal question is involved, because no question, Federal or otherwise, is involved, owing to the fact that they have never acquired any right, nor has their predecessor, the Central Tunnel Railway Company, ever acquired any right, to construct a railway under the streets of New York on the route indicated in the bill of complaint.

It cannot be said that a right is claimed *in good faith* where, on the face of the pleading, read in connection with the statutes of the State, it is shown that

the party making the claim has no right whatever to any relief in any court.

For the reason that the very foundation of the complainants' claim is shown not to exist, they cannot ask for any action of the Court upon the ground that a Federal question is involved.

## III.

### The Central Tunnel Railway Company, the predecessor of complainants, never had any legal existence.

Another fatal objection to the alleged rights of complainants-appellants is that their predecessor, the Central Tunnel Railway Company, never had any legal existence.

As has been shown, that company was alleged to be incorporated under the General Railroad Act of the State, chapter 140 of the Laws of 1850, and claimed to have derived its right of construction from the so-called Tunnel Act, chapter 582 of the Laws of 1880 (Record, pp. 36–38).

The purpose of the incorporation is stated to be the construction of an underground railroad *in the City of New York* on a route in the articles of association specifically set forth.

The fatal difficulty as to this is that at the time of the attempted incorporation of the Central Tunnel Railway Company there could not legally exist a corporation having for its corporate purposes the construction of a street railroad in the City of New York.

That an underground railroad such as that projected by the Central Tunnel Railway Company is a street railroad has been decided, as already shown, by the Court of Appeals, in Matter of N. Y. District R. R. Co., 107 N. Y., 42, already cited.

At the time of the attempted incorporation of the Central Tunnel Railway Company (March 26, 1881), and at the time of the order made by the General Term of the Supreme Court for the appointment of Commissioners (February 2, 1883), there was in force an act, chapter 10 of the Laws of 1860, entitled "An Act relative to railroads in the City of New York" which was as follows:

> "Section 1. It shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any or either of the streets or avenues of the City of New York wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions that said legislature may hereafter grant and provide" * * * .
>
> "Section 3. This act shall take effect immediately."

This act is positive in terms and has been construed by the New York Courts exactly in accordance with its plain provisions.

> Matter of Washington Street A. & P. R. R. Co., 115 N. Y., 442.
> Matter of People's Rapid Transit Co., 125 N. Y., 93.

The law as laid down in these cases is that street railroads could not, after the passage of the statute of 1860, be constructed under the General Railroad Act of 1850 and its amendments in the City of New York,

and that no authority for the construction of such a road existed in that City from the time of the passage of the Act of 1860 down to the time of the passage of chapter 252 of the Laws of 1884, entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages."

It was said in one of the cases cited, per PECKHAM, *J.*:

> "In regard to that city "(New York)" it is admitted that the General Railroad Law has now no application, for by chapter 10 of the Laws of 1860 it was made unlawful to thereafter lay, construct or operate a railroad in New York City except under the authority of the Legislature to be thereafter granted. The remark of Judge Rapallo in the first cited case "(New York Cable Company *vs.* The Mayor, 104 N. Y., 1)," that up to the time of the passage of the General Surface Street Railroad Act of 1884 there had been no law in force under which street railroads could be constructed except the Rapid Transit Act, the General Railroad Act of 1850 being inapplicable to street railways in cities, was not exactly accurate if applied to all the cities in the State, but was in entire accord with the truth in regard to the particular city "(New York)" which he was writing about and in which the corporation existed whose rights were then under review. The inclusion of the other cities of the State was not in any way material to his argument and was probably a mere inadvertent expression of the learned Judge, the important fact being that the General Railroad Act of 1850 did not apply to street railways in the City of New York."
>
> Matter of Washington Street A. & P. R. R. Co., 115 N. Y., 445, 446.

(The Rapid Transit Act referred to in the opinion of Judge Peckham is the Elevated Railroad Act, chapter 606 of the Laws of 1875, which had and could have no reference to a corporation attempting to be incorporated under the General Railroad Act to exercise powers quite other and different from those provided for in the Act of 1875.)

(No claim is made by the complainants that the predecessor, the Central Tunnel Railway Company, could avail itself of any other rights conferred by the Elevated Railroad Act of 1875.)

We have, therefore, not only the facts set forth in the preceding point, that the Central Tunnel Railway Company never complied either with the Constitution or the Laws of the State of New York, but also that its attempted incorporation was absolutely nugatory, for the reason that the object of its corporate life was one prohibited by the statute, chapter 10 of the Laws of 1860.

And a citation of cases is unnecessary to support the proposition that there cannot be valid incorporation for purposes positively forbidden by express statute.

The Central Tunnel Railway Company, therefore, never had any legal existence.

## IV.

### Any possible rights of complainants' predecessor have lapsed.

Even if the Central Tunnel Railway Company ever had a corporate existence, that corporate existence has ceased.

It appears by Exhibit "A," attached to the bill of complaint, which is the Articles of Association of the Central Tunnel Railway Company, that it was organized under the General Railroad Act of 1850, chapter 140 of that year, and that it obtained the right of construction under a supplemental act, chapter 582 of the Laws of 1890.

It is provided by chapter 775 of the Laws of 1867 of the State of New York, as follows:

> "Section 1. If any corporation formed under an act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' passed April two, eighteen hundred and fifty, shall not, within five years after the articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road and expend thereon ten per cent. of the amount of its capital, or shall not finish its road and put it in oporation in ten years from the time of filing its articles of association as aforesaid, *its corporate existence and powers shall cease.*"

It appears from the bill of complaint (Record, page 38), that the Articles of Association of the Central Tunnel Railway Company were filed and recorded in the office of the Secretary of State, March 26, 1881; therefore under the terms of the act just quoted, it should, to save its corporate existence and powers, have begun the construction of its road and expended thereon ten per cent. of the amount of its capital within ten years thereafter.

There is no allegation in the complaint that it ever began the construction of its road or expended ten per cent. of its capital, namely, ten per cent. of five million dollars within the ten years or at any other time.

It is very apparent that the intention of the statute was to cure the evil so well illustrated by this suit,

namely, the existence of paper corporations which do no work whatever except to stand in the way and to prevent public improvement unless they are bought off.

That the failure specified in the section just quoted is self-executory has been held by the Court of Appeals of the State of New York in the following cases:

Matter of B. W. & N. R. R. Co., 72 N. Y., 245.

Matter of B. W. & N. R. R. Co., 75 N. Y., 335, 337.

Brooklyn Steam Transit Company *vs.* City of Brooklyn, 78 N. Y., 524.

It is, of course, true that in different jurisdictions throughout the country very different effect has been given to statutes forfeiting the charters of corporations, but in the present case, we have language as plain as language can be made, that in the event stated, the "*corporate existence* and power *shall cease*," and this plain provision has been construed, as has been stated, by the Court of Appeals of the State, in accordance with its terms.

It has been stated in the brief of complainants-appellants that two of the cases just cited have been practically overruled.

So far from this being the case, they have been distinctly recognized as sound when applied to the statute in question, by subsequent cases in the Court of Appeals.

Matter of Brooklyn Elevated R. R. Co., 125 N. Y., 434–441.

Matter of New York and Long Island Bridge Co., 148 N. Y., 540–547,

in which last case it is said:

> "The question as to whether a forfeiture clause is or is not self-executing depends wholly upon the language employed by the Legislature" (148 N. Y., 547).

Some kind of claim is apparently made in the brief of complaints-appellants that the transfer of the alleged rights of the Central Tunnel Railway Company to its successors in some way gave those rights a longer lease of life, but this, of course, is not so, for a corporation cannot prolong the life of its franchises by transferring them to another corporation.

Matter of Brooklyn W. & N. R. R. Co., 81 N. Y., 69.

## V.

### The Rapid Transit Act is constitutional.

If, as has been heretofore shown, complainants' predecessor had no legal existence at the time of the commencement of the suit, nor any contract rights whatever, the attack made on the Rapid Transit Act, chapter 4 of the Laws of 1891, on the ground of unconstitutionality, will not avail them.

The fact is, however, that this act has been declared to be constitutional by the Court of Appeals of the State of New York.

Sun Publishing Company *vs.* The Mayor, 152 N. Y., 257.

(The citations at pages 37–43 of complainants' brief of extracts from opinions in the Appellate Division in the Sun Publishing case are from dissenting opinions).

## VI.

### The rights claimed by complainants otherwise than through The Central Tunnel Railway Company.

Only the alleged rights of complainants-appellants claimed by them as successors of The Central Tunnel

Railway Company have been discussed in this brief, because the principal claim of these complainants-appellants is made as successors to that alleged corporation.

The New York and New Jersey Tunnel Railway Company and The Terminal Underground Railway Company were two other paper corporations organized under the same act as The Central Tunnel Railway Company, but they have done absolutely nothing.

Besides this, the first-named was attempted to be incorporated at a time (January 2, 1883) when a street railroad could not organize for operation in the City of New York for the reasons stated in Point 2 hereof.

## VII.

### The first question certified.

It has seemed to defendants-respondents that if the second question certified is answered in the negative, there is nothing left to the case.

And it would seem that an analysis of the first question will show that it is not open to any very serious discussion.

What it really means is that if when a party comes in the Circuit Court claiming an alleged right under the Constitution, it should turn out that he has no such right at all, can that Court entertain jurisdiction to hear and determine other matters of equitable cognizance pleaded in the bill, which are not Federal questions at all; or, in other words, if when the essential ground of jurisdiction has fallen, can the Court go on and determine questions which are not Federal and therefore are not within its jurisdiction.

It seems to defendants-respondents, as has been said, that this appeal should be disposed of upon a consideration of the second question certified, and these defendants-respondents have confined themselves to a brief analysis of what they regard as the fundamental question in the case.

## VIII.

### The decree should be affirmed and the certified questions answered in the negative.

Many other reasons might be advanced in support of the decree below, but it is believed that the foregoing considerations briefly set forth, taken in connection with the points made by the co-defendants-respondents of the present defendants-respondents, are amply sufficient to sustain the decree upon the ground that the Circuit Court had no jurisdiction, and the questions certified should be answered in the negative.

Respectfully submitted,

GEORGE L. RIVES,
Corporation Counsel,

Solicitor for defendants-respondents, The City of New York, Robert A. Van Wyck, individually and as Mayor of The City of New York; Bird S. Color, individually and as Comptroller of The City of New York, defendants-respondents.

THEODORE CONNOLY,
Of Counsel.